

**STATEMENT
OF
NEAL MCCALED, ASSISTANT SECRETARY-INDIAN AFFAIRS,
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE
ON S. ____,
“ZUNI INDIAN TRIBE WATER RIGHTS SETTLEMENT ACT OF 2002”**

JULY 18, 2002

Good morning Mr. Chairman and members of the Committee. I am Neal McCaleb, Assistant Secretary for Indian Affairs at the Department of the Interior. I appreciate the opportunity to appear before this Committee to discuss S. ____, a bill to authorize a water rights settlement for the Zuni Heaven Reservation, in northeastern Arizona.

The Administration generally supports the bill but has some concerns with certain provisions. The Administration has concluded, however, that the unique context presented by the Zuni lands in Arizona may warrant provisions of this nature with some modifications. For three reasons, the Zuni Settlement presents a unique situation. First, the tribal lands at issue are primarily for ceremonial use and generally will not be used as a homeland or to accommodate tribal members. Second, the water rights and land area involved are relatively small. Finally, the Settlement provides a benefit by allowing additional lands to be taken into trust and provides accompanying water rights. Based on the consideration of these unique circumstances, the Administration supports S. ____ in concept. In general, many of the provisions found in S. ____ are the exception rather than the rule and may not necessarily be appropriate in other Indian water settlements.

In general, the settlement reached by the parties is the product of a cooperative effort over the last five

years among the Zuni Tribe, the State of Arizona, the United States, the Salt River Project and many other local water users. This effort was aided greatly by the work of the Honorable Michael C. Nelson, Presiding Judge for Apache County Superior Court, who has mediated the settlement discussions. The Settlement Agreement has been signed by the Tribe and is pending formal signature by the other parties.

Background

The Little Colorado River (LCR) Basin covers an area of approximately 17.2 million acres or 26,964 square miles in northeastern Arizona and northwestern New Mexico. The main stem of the Little Colorado River is entirely in Arizona. Therefore, this adjudication deals only with claims inside the borders of Arizona. Five different Indian tribes have reservations, or pending claims to reservation lands, within the Basin: the Navajo Nation, Hopi Tribe, Zuni Tribe, San Juan Southern Paiute Tribe and the White Mountain Apache Tribe.

The settlement agreement at issue here concerns only the Zuni Tribe's relatively small water right claims at the Zuni Heaven Reservation located in the south eastern section of the Basin, at the confluence of the Zuni and Little Colorado Rivers. Zuni Heaven is a unique reservation created fairly recently to accommodate the religious and cultural practices of the Zuni. The main Zuni reservation, in contrast, is located in New Mexico. The majority of the Zuni members reside on the main reservation.

According to Zuni religious beliefs, a lake formerly located on the Zuni Heaven Reservation is a

window into heaven. That lake and the surrounding wetlands disappeared in recent history due to upstream diversions and groundwater pumping in the surrounding areas. The Settlement provides the Tribe with the water and land to restore the lake for use in future religious ceremonies.

The Zuni Heaven Reservation was established by Congress in 1984 through Public Law 98-498 and expanded in 1990 through Public Law 101-486 to further the religious and cultural needs of the Tribe. That legislation established the land base of the Reservation within the Tribe's aboriginal territory and facilitated the Tribe's regular pilgrimage from New Mexico to Arizona by authorizing the United States to obtain easements along the pilgrimage route.

Since 1979, water rights in the Little Colorado River basin have been the subject of an Arizona state general stream adjudication. The United States filed a water rights claim on behalf of the Zuni Tribe in the state proceeding for water rights to Zuni Heaven. Mirroring most general stream adjudications, the litigation has moved very slowly. Recognizing that the Zuni claims lent themselves to settlement, the parties devoted significant effort to negotiations. The Settlement Agreement and S. ____, which would ratify that agreement, are the fruits of that negotiation.

The Draft Legislation (S.)

S. ____ approves and authorizes federal participation in the main settlement agreement, which includes three subsidiary agreements with individual parties. When fully implemented, this agreement would constitute a final settlement of the water rights claims of the Zuni Tribe and the United States' claims on

behalf of Zuni. The settlement agreement will secure a water budget of approximately 5,500 acre-feet per year, including both surface water and groundwater, for the rehabilitation and restoration of the Sacred Lake, wetlands and riparian areas of the Reservation. The surface water component of this water budget would be secured through the purchase of state law based water rights from willing sellers, as well as through flood flows of the Little Colorado River. To supplement surface flows in times of drought and to allow for the initiation of restoration activities while surface water rights are acquired, the settlement provides for a groundwater right of 1,500 acre feet per year.

The settlement involves significant cost sharing and cooperation among the federal government and the state and local parties. The Tribe's non-Indian neighbors have agreed to assist in the acquisition of water rights, to store surface water supplies for the Tribe, and to make other contributions to carry out the settlement. In addition, some water supplies for the settlement will be secured through up to \$6 million in water protection grants funded by the State of Arizona. The federal contribution of \$19.25 million to the settlement would be authorized. These federal funds would be used for the acquisition of water rights, as well as other actions necessary to restore the Sacred Lake, the wetlands and riparian areas of the Zuni Heaven Reservation.

We believe the federal contribution contemplated in S. ____ is appropriate to facilitate resolution of the Zuni Tribe's claims. The settlement is designed to release the United States from any potential damage claims that might be asserted by the Tribe and to relieve the government of the obligation to litigate, at significant cost and over many years, the Tribe's water rights claims. At the same time, a final

resolution of the Tribe's water rights claims would provide certainty to its neighbors, enabling them to plan and make necessary investments based on the assurance that they have secure and stable water rights.

Concerns with the Draft Legislation

The Administration in concept supports the settlement set forth in S.____, but has a few areas of concern with the bill as drafted. We are committed to working with the Committee, Senator Kyl, and the settlement parties during the upcoming August recess in this regard to reach a mutually agreeable solution.

We believe through working with the Committee and Senator Kyl, we can improve the following areas of the bill: Our first area of concern are the water quality waivers. The broad waivers within S. ____ need to be clarified to avoid future litigation regarding the distinction between the sovereign capacity and trust capacity of the United States and to safeguard the authority of the United States enforcement authority. Second, the provisions regarding rights-of-way across tribal trust land conflict with established law and may lead to unnecessary litigation. Third, the United States opposes any additional waiver of its sovereign immunity as there exist sufficient avenues to address the interpretation or enforcement of S. _____. Fourth, S. _____ raises a concern regarding the authority of the United States to remove actions to a federal court. Finally, S. ____ treats land taken into trust as state lands for purposes of environmental regulation and permitting, contrary to current law and practice. The United States believes, however, that the intentions of the parties to the Settlement Agreement can be

addressed through alternative language while reducing litigation risk.

Conclusion

Negotiated agreements among Indian tribes, states, local parties, and the federal government, in general, are the most effective way to resolve reserved water right claims in a manner that secures tribal rights to assured water supplies for present and future generations while at the same time providing for sound management of an increasingly scarce resource. The known benefits of settlement generally outweigh the uncertainties that are inherent in litigation to the Tribe, the state, other interested parties and the United States. On balance, the very unique circumstances of the Zuni and their lands and the benefits of this settlement, with certain modifications, outweigh concerns regarding these unusual aspects of this settlement.

We appreciate Senator Kyl's commitment to working with us and look forward to working closely with the Committee and the settlement parties to refine and clarify the language of S. ____ to ensure that this legislation can be enacted into a law that advances the interests of all parties.